

2709 No. 13079

United States
Court of Appeals
For the Ninth Circuit.

RAY P. KOENIG,

Appellant,

vs.

DONALD CORCORAN,

Appellee.

Transcript of Record

Appeal from the United States District Court,
for the District of Montana.

FILED

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PAUL P. O'BRIEN
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

P. W. LANIER and P. W. LANIER, JR.,
Fargo, North Dakota;

ANDREW G. SUTTON,
Billings, Montana,
For Plaintiff and Appellant.

H. B. LANDOE,
Bozeman, Montana,
For Defendant and Appellee.

In the United States District Court for the District
of Montana, Helena Division

No. 502

RAY P. KOENIG,

Plaintiff,

vs.

DONALD CORCORAN,

Defendant.

COMPLAINT

Plaintiff for right of action alleges:

I.

That he is a citizen of the State of North Dakota and that the defendant is a citizen of the State of Montana, and that the amount involved herein is in excess of Three Thousand Dollars, exclusive of costs.

II.

That on the 8th day of March, 1942, plaintiff married Eunice Jantvold in Walker, County of Cass, Minnesota, and thereafter lived in the State of Minnesota up to and until July, 1947, when plaintiff's wife left him and went to the home of her parents in Bemidji, Minnesota, where she stayed with the exception of a day or two at a time when she would come back and stay with plaintiff, and that this continued until Christmas, 1947, when plaintiff's wife advised him that she didn't love him and wanted a divorce; that plaintiff asked his wife if there was another man involved in the

case and she said there was not; that thereafter on or about the 7th day of May, 1947, in Crow Wing County, Minnesota, plaintiff's wife obtained a divorce from him which was not contested by plaintiff.

III.

That prior to said divorce and prior to the time that the said wife left plaintiff, the defendant who was a resident of the State of Montana, without the knowledge of this plaintiff, became acquainted with plaintiff's said wife and at regular intervals plaintiff's said wife would leave plaintiff and be gone for several weeks at a time [2*] representing to plaintiff that she was with her parents or with her kinfolk and during such times, the said defendant was in the company of plaintiff's wife; that these regular absences on the part of plaintiff's wife continued up to the time that she left him; plaintiff was surprised and did not understand just what had happened to change the attitude of his wife toward him; plaintiff knew nothing about her acquaintance with said defendant and when she said that she was going to sue him for divorce, he made no effort to defeat her claim for divorce believing that for some reason unknown to him she had ceased to love him; that he did not suspect that there was any man involved in the matter; that born to plaintiff and his said former wife was a boy, Terry Charles, now seven years of age, and now with his said mother.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

IV.

After the granting of said divorce, for the first time, plaintiff learned that his wife and the defendant were keeping company with each other and engaging in social relations; that since said divorce said wife has married the defendant and is now residing with him in the State of Montana and has with her the child of plaintiff and his said former wife.

V.

Plaintiff charges that while plaintiff was happily married and supporting his said wife, defendant in November, 1947, met her at or near Bemidji, Minnesota, and began regularly keeping company with her; that in February, 1948, he ascertained that she was married; that from the time of meeting the said wife of plaintiff in November, 1947, he alienated her affections, and in February or March, 1948, after learning of said marriage, he continued to keep company with her and proceeded to carnally know her with knowledge of the fact she was married; that in pursuance of her loss of affections aforesaid, plaintiff's wife obtained a divorce from the plaintiff, and married the defendant.

VI.

That by reason of the premises, plaintiff has been and still is wrongfully deprived of the society, comfort and aid of his wife and child and has been put to great trouble and expense on account of her absence and has suffered great distress of both mind and body to his damage in the sum of One Hundred Thousand Dollars (\$100,000.00). [3]

Wherefore, plaintiff demands judgment against defendant in the sum of One Hundred Thousand Dollars (\$100,0000.00) and his costs and disbursements herein.

Dated this 26th day of October, 1950.

P. W. LANIER,

P. W. LANIER, JR.,

LANIER & LANIER,

Attorneys for Plaintiff.

JOHN B. TANSIL,

Attorney for Plaintiff.

[Endorsed]: Filed November 3, 1950.

[Title of District Court and Cause.]

ANSWER

Comes now the Defendant in the above-entitled action and for answer to Plaintiff's complaint Defendant admits, denies, and alleges as follows:

I.

Admits the allegations contained in paragraph I of the Plaintiff's complaint.

II.

For answer to the allegations contained in paragraph II of Plaintiff's complaint, Defendant alleges that he does not have sufficient information, knowledge or belief to form an opinion as to the

truth or falsity of the allegations therein set forth and therefore denies the same, except as to the allegation that Plaintiff's wife obtained a divorce from Plaintiff.

III.

For answer to allegations contained in paragraph III of said complaint, Defendant denies the same.

IV.

For answer to the allegations contained in paragraph IV of said complaint, Defendant admits that he is married to the former wife of Plaintiff and resides in the State of Montana and denies all other allegations and matters contained in said paragraph IV.

V.

Defendant denies each and every allegation, matter and thing contained in paragraph V of said complaint, except that he admits he is married to the former wife of said Plaintiff.

VI.

Defendant denies the allegations contained in paragraph VI of said complaint. [5]

For a further and separate defense to said complaint, the Defendant alleges:

I.

That Plaintiff's wife, Eunice, separated from the Plaintiff prior to any acquaintance on the part of the Defendant with said Plaintiff's wife, and that Defendant's acquaintance was subsequent to the

alleged alienation of affections of Plaintiff's wife for the Plaintiff herein, and Defendant is informed, and believes, and therefore alleges, that said separation on the part of the Plaintiff and his wife, and the loss of affections of Plaintiff's wife for the Plaintiff, and the resulting divorce of said parties was caused by the Plaintiff's own conduct toward his said wife Eunice.

Wherefore Defendant prays that Plaintiff take nothing by his said complaint and that the Defendant be dismissed with his costs.

Dated this 27th day of March, 1951.

H. B. LANDOE,
Attorney for Defendant.

State of Montana,
County of Gallatin—ss.

Donald Corcoran being first duly sworn, upon oath, deposes and says:

That he is the Defendant named in the foregoing action; that he has heard read the foregoing answer and knows the contents thereof and that the matters and things therein set forth are true of his own knowledge, information and belief, and as to those matters set forth upon information and belief, he believes them to be true.

DONALD CORCORAN.

Subscribed and sworn to before me this 31st day of March, 1951.

[Seal] H. B. LANDOE,
Notary Public for the State of Montana Residing
at Bozeman, Montana.

My commission expires Oct. 20, 1951.

[Endorsed]: Filed April 7, 1951. [6]

In the District Court of the United States in and
for the District of Montana

No. 502

RAY P. KOENIG,

vs.

DONALD CORCORAN.

ORDER

Counsel for respective parties, with the jury, present as before and trial of cause resumed.

Thereupon Ray P. Koenig was sworn and examined as a witness for the plaintiff, whereupon plaintiff rested.

Thereupon the jury was duly admonished by the Court and excused until 2:00 p.m., whereupon, in the absence of the jury, counsel for defendant moved the Court for an order of dismissal of this cause on the ground that upon the facts and the law that plaintiff has shown he has no right to

relief. Thereupon said motion was argued by counsel, whereupon counsel for plaintiff moved the Court for leave to reopen his case for the purpose of introducing further proof, which motion was submitted and by the Court taken under advisement, and a recess taken until 1:30 p.m. this day.

Thereafter, at 1:30 p.m. counsel for respective parties were present as before. Thereupon counsel for plaintiff announced that in lieu of his motion to reopen plaintiff's case, he now moves the Court to amend the pleadings to conform to the proof, pursuant to Rule 15(b) and (c) of the Rules of Civil Procedure, by substituting a new paragraph for paragraph 5 of the complaint, which amendment was read into the record. Thereupon said motion was argued by counsel and submitted, whereupon, after due consideration, Court ordered that the motion be granted and the amendment allowed.

Thereupon further argument was made by counsel on the defendant's motion to dismiss, whereupon counsel for plaintiff renewed his motion for leave to reopen plaintiff's case, which latter motion was by the Court denied. Thereupon the jury was returned into court.

Thereupon, after due consideration, Court ordered that the defendant's motion to dismiss the cause be and is granted, and that the jury be discharged from further consideration of the cause.

Thereupon counsel for plaintiff excepted to the ruling of the Court in dismissing the cause, and gave oral notice of appeal.

Entered in open Court at Helena, Montana, June 15, 1951.

H. H. WALKER,
Clerk. [7]

[Title of District Court and Cause.]

JUDGMENT

This cause came on regularly for trial before the Honorable W. D. Murray, Judge of the above-entitled Court, on the 14th day of June, 1951. A jury of twelve persons was regularly impanelled and sworn to try said action; witnesses on the part of the plaintiff were sworn and examined. The plaintiff was represented in said trial by P. W. Lanier, Esquire, of Fargo, North Dakota, and Andrew Sutton, Esquire, of Billings, Montana. H. B. Landoe, Esquire, of Bozeman, Montana, represented the Defendant.

At the conclusion of the testimony of the witnesses for the Plaintiff and declaration in open Court by counsel for the Plaintiff that Plaintiff rested his case, counsel for the Defendant made a motion in open Court for a dismissal of said action upon the ground that upon the facts and the law, the Plaintiff had shown no right to relief. The Court thereupon heard argument of counsel in support of said motion and argument by counsel for the Plaintiff in opposition thereto and that prior to the ruling upon said motion by the Court, counsel for Plain-

tiff asked leave to re-open Plaintiff's case to introduce further evidence and that the Court, after considering the request of the Plaintiff to re-open his case, denied said request, and the Court having considered the motion to dismiss and having heard the arguments pertaining thereto, and being fully advised in the premises, did, thereupon grant the motion to dismiss this action.

Now, therefore, it is ordered, adjudged, and decreed that Plaintiff take nothing by this action.

Dated this 22nd day of June, 1951.

H. H. WALKER,
Clerk of the United States Court for the District
of Montana, Helena Division.

[Endorsed]: Filed and entered June 22, [8]
1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Ray P. Koenig, plaintiff in the above-entitled action, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the Order of the United States District Court for the District of Montana, Helena Division, dismissing the Complaint, and from the final judgment entered thereon in the above-entitled action, upon all questions of fact and law.

Dated July 9, 1951.

P. W. LANIER,

P. W. LANIER, JR.,

LANIER & LANIER,

ANDREW G. SUTTON,

By P. W. LANIER,

Attorneys for Plaintiff.

[Endorsed]: Filed July 10, 1951. [9]

In the United States District Court, District of
Montana, Helena Division

No. 502

RAY P. KOENIG,

Plaintiff,

vs.

DONALD CORCORAN,

Defendant.

Before: The Honorable W. D. Murray,
U. S. District Judge.

REPORTER'S TRANSCRIPT

June 14 and 15, 1951

P. W. LANIER, Esq.,

A. G. SUTTON, Esq.,

Attorneys for Plaintiff.

H. B. LANDOE, Esq.,

Attorney for Defendant. [17]

DONALD A. CORCORAN

the defendant, called as a witness on behalf of the
plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Lanier:

Q. State your name to the Court and jury.

A. Donald A. Corcoran.

Q. Where do you live, Mr. Corcoran?

(Testimony of Donald A. Corcoran.)

A. I live in Bozeman, Montana.

Q. And before you came to Bozeman, where did you live?

A. I lived in Bemidji, Minnesota. [47]

Q. Before then, where did you live?

A. At Webster, Wisconsin.

Q. You were interested in business in those three points? A. That's right, sir.

Q. And you are now?

A. That's right, sir.

Q. When did you first meet the plaintiff's wife?

A. It was in late November, 1947.

Q. Where did you meet her?

A. I met her at a place called the Dutchess, which was about a mile west of the City of Bemidji.

Q. How did you come to meet her?

A. I was out there with some friends. It was during the deer season time. We had come back from a hunting trip, and we went out there to the Dutch Tavern, the Dutchess, I should say, and at that time she was there, she was working there.

Q. Were you formally introduced?

A. I would say yes, that I was formally introduced. She was sitting at a table when we came up there.

Q. By whom?

A. By a fellow by the name of Elicia Utter.

Q. That was the first time you ever saw her?

A. No, I would not say it was the first time I had ever seen her.

Q. When did you first see her? [48]

(Testimony of Donald A. Corcoran.)

A. Oh, I would say the start of that hunting trip. I picked up a fellow out there to go up on the hunting trip.

Q. Did you inquire who she was?

A. No, I didn't.

Q. But on the night you met her, had you inquired who she was?

A. No, I didn't even do that.

Q. After you met her—do you remember the date?

A. No, I don't. It was in the last part of November, that I do know; it was deer season time. That is all I know.

Q. Were you at the Dutchess shortly after the 11th of November, Armistice Day?

A. I could have been, but I don't recall, sir.

Q. After you met this wife of the plaintiff, did you or not have social engagements with her?

A. No, I did not, sir.

Q. During the month of November?

A. No, sir.

Q. During the month of December?

A. No, sir.

Q. You never went with her at any place?

A. No, sir, not at all in that time.

Q. You never saw her anywhere?

A. Yes, sir, I did see her.

Q. You knew that she was married? [49]

A. I did not, sir.

Q. When did you find out she was married?

(Testimony of Donald A. Corcoran.)

A. It was sometime in the latter part of February was the first time I knew she was married.

Q. And from November until December, is your position that you never were with her? [50]

* * *

C. H. STROWBRIDGE

called and sworn as a witness in behalf of the plaintiff, testified:

Direct Examination

By Mr. Lanier:

Q. Your name is C. H. Strowbridge?

A. That's right.

Q. You live in Bemidji, Minnesota?

A. I do.

Q. How long have you lived there?

A. All my life. [54]

Q. In what business are you now engaged?

A. Running a tavern.

Q. What is the name of your tavern?

A. Dutchess Tavern and night club.

Q. How long have you run that tavern?

A. I lived there for ten years, but I didn't exactly run it all the time, but I've been around there for ten years.

Q. How far is that tavern located from the city of Bemidji, Minnesota? A. A mile.

Q. And adjacent to the tavern is there a residence? A. Yes.

Q. How far is that from the tavern?

(Deposition of C. H. Strowbridge.)

A. Oh, just a little ways.

Q. Approximately a hundred feet, or more or less?

A. A hundred feet.

Q. Is the tavern that you operate now a newly-constructed tavern?

A. Yes, it's about three and a half years old.

Q. Before that time was there a tavern there?

A. Yes, an old one.

Q. And were you interested in the old tavern?

A. Yes.

Q. Now, this residence, that is near the tavern that you [55] mentioned?

A. Yes.

Q. Whose residence is that?

A. Mine.

Q. How long have you resided and made that your home in that place?

A. A little over eleven years.

Q. How many rooms are there in that residence?

A. Oh, about seven.

Q. Is it a two-story or single-story house?

A. Two story.

Q. Are there bedrooms upstairs and downstairs?

A. The upstairs is bedrooms and there's one downstairs.

Q. Are you married or single?

A. Single.

Q. Were you married in the fall of 1947?

A. Yes.

Q. Whom did you marry?

A. Marion Jantvold.

Q. Was she a resident of Bemidji, Minnesota?

A. Yes.

(Deposition of C. H. Strowbridge.)

Q. Do you know Eunice Corcoran, the former wife of Ray Koenig? A. Yes.

Q. State what relation, if any, she is to your wife with [56] whom you were living in 1947.

A. They're sisters.

Q. They are sisters? A. Yes.

Q. Do you know the plaintiff in this case, Ray Koenig? A. Yes.

Q. How long have you known him?

A. Oh, 15 years anyway, maybe more, 15 or 17, something like that.

Q. Do you know whether or not he is a Bemidji boy? A. Yes, he is.

Q. What's that?

A. Yes, he is; he is, yes.

Q. Did you know the defendant's wife, Mrs. Corcoran, during the years 1947 and 1948?

A. Yes.

Q. Do you know whether or not during those years up to May, 1948, she was the wife of the plaintiff in this case? A. Yes.

Q. Was she or not? A. She was.

Q. Do you know where the residence of the plaintiff and his then wife was in the fall and summer of 1947

A. Fall and summer of 1947?

Q. Yes. Where did he live at that time? [57]

A. Brainerd.

Q. At Brainerd. And do you know what business the plaintiff was engaged in at Brainerd?

A. He's a mechanic.

(Deposition of C. H. Strowbridge.)

Q. Do you know what garage or place he worked for there?

A. Yes, he worked for the Auto Marine Sales or Riverview Packard Company, I don't know, or some such a name.

Q. Do you know the defendant, Corcoran?

A. The defendant in this lawsuit, yes, I know him.

Q. Can you tell me approximately when you first met him?

A. Oh, I'd say it was in the fall of 1947.

Q. Do you remember that you ever saw the defendant, Corcoran, in the company of Eunice Koenig at that time, the present Mrs. Corcoran?

A. At that time?

Q. In the fall of 1947? A. Yes.

Q. Well, can you give me approximately when you first saw them together in the fall of 1947?

A. Oh, I would say about November.

Q. Have you any way or anything that brings to your mind or refreshes your recollection of the occasion or the time when you first met him?

A. I can't just remember the first time exactly.

Q. When did the new building, the night club that you [58] have there, when did you open that?

A. Armistice Day, 1947.

Q. That was November 11, 1947?

A. That's right.

Q. Well, would you say, or are you in a position to say, whether or not you saw these people together at that time or prior to that time or after that time?

(Deposition of C. H. Strowbridge.)

A. Well, it was right around that time when I first met him.

Q. Right around that time when you first met him. And where did you first see him?

A. I believe it was in there.

Q. In that club?

A. As near as I can remember, that's where it was.

Q. You saw them together? A. Yes.

Q. Was it night time?

A. I wouldn't say they were together the first time I seen him because I don't remember.

Q. Now, the first time you saw them they might have been together?

A. They might have been the first time, I don't know.

Q. Along about that time, November 11th or shortly thereafter, 1947, did you see them in your night club together? [59]

A. I've seen them in there off and on, but I don't remember the dates, you know.

Q. Now, state whether or not the defendant's wife, who was then the wife of this plaintiff, would visit in your home and stay with you when she was in Bemidji?

A. She was staying with me then.

Q. She was staying with you. State whether or not she occupied a room, had her sleeping quarters in your place? A. She stayed in the house.

Q. And your wife, who was there at that time, was a sister of Mrs. Koenig, is that right?

(Deposition of C. H. Strowbridge.)

A. Yes, that's right.

Q. Well, now, during the time she was there, visiting there in your home from time to time, did you see her in the company of the defendant, Corcoran?

A. During that—what time?

(Q. 1947 and 1948? A. I did at times.)

(Note: The above question and answer in parentheses, which appeared on page 8 of the original deposition, was ordered stricken by the Court at proceedings in chambers, as shown pp. 4-8 of this transcript, and was not read to the jury.)

Q. Well, state whether or not you would see them together as much as two or three times a week at your club at times?

Mr. Landoe: May I interrupt, Mr. Lanier? [60]

Mr. Lanier: Yes.

Mr. Landoe: On the matter of objections, I don't know where we stand on them, and if it is agreeable with you we can raise objections at the time of the trial.

Mr. Lanier: Under the rules you have a right to do that; in other words, though, if you want a stipulation to that effect, I will be glad to stipulate with you that that may be done.

Mr. Landoe: That is agreeable, and so understood.

Mr. Lanier: Yes. Now, if you'll read the last question.

(Deposition of C. H. Strowbridge.)

(Question read.)

A. Oh, some weeks, some weeks I wouldn't see them at all.

Q. Some weeks you would?

A. Some weeks.

Q. And some weeks you wouldn't see them at all?

A. That's right.

Q. I take it you are not in a position to specify definitely which weeks you saw them and which weeks you didn't?

A. That's right.

Q. Well, now, did that occur during the fall of 1947, and during the winter and early spring months of 1948?

A. Yes. [61]

* * *

Cross-Examination

By Mr. Landoe:

Q. I believe you testified you had known Ray Koenig for a little over 15 years? [75]

A. Yes, that's correct.

Q. And he is the plaintiff in this litigation versus Donald Corcoran, is he not?

A. Yes.

Q. How well do you know Ray Koenig? Did he work for you ever?

A. Well, he worked for me once up on the farm when we were farming.

Q. Did he ever do any work for you at the tavern?

A. He was never hired by me at the tavern.

Q. Did he ever help you out at the tavern?

(Deposition of C. H. Strowbridge.)

A. He did a few times, but he was never on the pay roll or never hired at the tavern. The only time I ever hired him was work around the farm.

Q. But he has done some work around the tavern?

A. Yes, he used to tinker around there, around the tavern.

Q. What do you mean by tinker around, did he stay around there for days at a time, or what?

A. That's right, he and his wife both did when he was married.

Q. They hung around this tavern some?

A. And in the house.

Q. And in the house. Over what period would that extend, several weeks or months or what? [76]

A. I would say the last 11 years.

Q. In other words, they were in and out there——

A. Off and on.

Q. ——for approximately 11 years?

A. Yes.

Q. During which time Ray and his wife, Eunice, would both be in and about the tavern, is that correct?

A. Sometimes they would be.

Q. During those times you say Ray Koenig would help you out in the tavern?

A. Well, he never was hired to work in that tavern, but I have seen times he would come in there and maybe sweep the floor and things like that once in a while. He would be staying at the house.

(Deposition of C. H. Strowbridge.)

Q. In other words, you have been quite friendly with him? A. Oh, yes.

Q. Is that true? A. Yes.

Q. He is what you would consider one of your good friends? A. Well, he always was.

Q. Now, you testified that you were married to Marion; is that correct?

A. That's right. [77]

Q. And that she was a sister, or is a sister, of Eunice's? A. Yes.

Q. Being referred to, I believe, in your testimony as the wife of Ray Koenig? A. Yes.

Q. How long were you married to her?

A. Oh, 12 years.

Q. Until what date?

A. A year ago last September I got a divorce.

Q. A year ago last September?

A. That's right.

Q. That would be what year, 1948 or 1949?

A. 1949.

Q. You were divorced in 1949? A. Yes.

Q. I believe you testified in your direct testimony that it was 1948; do you have that clear in your mind?

A. Yes, my wife—we separated then, but I didn't get a divorce until 1949. Separated April 3, 1948, and divorced September, 1949.

Q. And you became separated on April 3, 1948?

A. Right.

Q. Now, who filed for this divorce?

A. I did. [78]

(Deposition of C. H. Strowbridge.)

Q. And that was in September, you say?

A. No, I filed before that. Became final in September, 1949.

Q. I believe you testified that Eunice Koenig was living at your place in the fall of 1947?

A. Yes.

Q. When did she come there?

A. She came there in the month of July, 1947.

Q. And stayed in your home?

A. That's right.

Q. For how long?

A. Well, she come there and made that her home until she left the next June, sometime in July, I believe she left there then.

Q. In 1948? A. Yes.

Q. The subsequent year? A. Yes.

Q. Did she have a child with her?

A. Yes.

Q. Did the child make his home at your residence during that time? A. That's right.

Q. And that was her home during that period?

A. That's right. [79]

Q. Ray wasn't living there during that time, I don't suppose? A. No.

Q. Where was he living? A. Brainerd.

Q. During that time do you know whether or not she was taking treatments from a doctor in Brainerd, do you recall that?

A. She had some dentist work done down there, I know.

Q. Well, do you recall—if you don't, okay—or

(Deposition of C. H. Strowbridge.)

do you have any knowledge as to whether or not she was taking treatments from a physician in Brainerd?

A. All I remember is she told me about getting her teeth fixed.

Q. All right. She left—she lived at your house from April until June or July, I should say, 1947, until approximately June of 1948, you say?

A. Sometime in June.

Q. During that time was she in and about your tavern a great deal?

A. Oh, quite a little.

Q. Did she help you out any?

A. Oh, she didn't do much in the tavern.

Q. Did she occasionally help you with tables and that sort of thing? [80]

A. Not during that time. She did before that, but not during that time.

Q. Was she in the tavern a great deal during that time?

A. Oh, she was in there off and on quite a bit.

Q. What was she doing in there?

A. I didn't see her do much of anything.

Q. Did you see her do any drinking?

A. Oh, at times, we all had to do some drinking.

Q. That is what the place is run for, is it not, to serve drinks; there is nothing else served there, is there?

A. No.

Q. It is strictly a tavern for drinking intoxicating liquors, is it not; that's what it is run for, is that right?

A. Well, 3.2 beer.

(Deposition of C. H. Strowbridge.)

Q. Well, 3.2 beer, is that the kind of beer you serve out there? A. That's right.

Q. You don't have a license to sell anything beyond 3.2 beer; is that correct?

A. No, not today.

Q. So the only thing you have a license to sell is 3.2 beer and no liquor; is that correct?

A. That's correct, but at that time, when she was staying with me, from 1948—from 1947 until 1948, during that [81] length of time I wasn't running the tavern myself. I was living there, but I wasn't running the tavern.

Q. Well, who owned the building?

A. I did.

Q. And why weren't you running the tavern?

A. Somebody else was.

Q. What was the reason why you weren't running the tavern; was it because you didn't have a license? A. Yes, that's true.

Q. Is that the reason? A. Yes.

Q. That is the reason why someone else was running it, is it?

A. At that time somebody else held the license.

Q. And the reason for that was why? Was it because your license was revoked?

A. Yes, six years before that.

Q. So that during that period of time, from April, 1947, until June, 1948, you saw a great deal of Eunice Koenig, did you not? A. Oh, yes.

Q. Why you had occasion to see her practically

(Deposition of C. H. Strowbridge.)

every day that she was in the city of Bemidji, in and about? A. Sure.

Q. And you know a great deal about her affairs during [82] those months, do you not—you were in a position to know?

A. Oh, I would say yes.

Q. She was in and about your tavern a great deal, day after day, almost; is that not true?

A. Well, after April she was working in town here during the day.

Q. After April of what year?

A. 1948. [83]

* * *

Q. Was Ray Koenig in the army in 1946?

A. I believe so, I think that is when he got out.

Q. All right, and you saw Eunice in the company of James Levitt in 1946; is that correct?

A. I believe so.

Q. Several times? [86] A. Oh, yes.

Q. That was while she was still married to Ray Koenig? A. Right.

Q. Now, do you remember a gentleman or do you know a gentleman by the name of Russell McKenzie of Bemidji? A. Right.

Q. You know him quite well, do you not?

A. Yes, sir.

Q. And you have been out with Russell McKenzie a number of times, I presume, yourself; is that right?

A. I have been out with him maybe three times, four times.

(Deposition of C. H. Strowbridge.)

Q. And you have been out with Russell McKenzie when he had a date with Eunice Koenig, have you not?

A. I was with Russell McKenzie once when he had Eunice with him.

Q. Yes? A. Right.

Q. And she went out with him several times in the fall of 1947, did she not? You know that of your own knowledge?

A. I only seen him out with her once when I was with him; that was in the fall of 1947, about in the month of October.

Q. Do you know when Eunice got her divorce?

A. She told me she got it in May. [87]

Q. Do you have any knowledge as to whether or not she celebrated her divorce with Russell McKenzie on the 7th day of May, 1948; do you have any knowledge of that?

A. I can't remember when she celebrated her divorce.

Q. Do you know Everett Utter? A. Yes.

Q. You have seen Eunice run around with Everett Utter? A. I can't say that I did.

Q. In the early part of 1948, did you ever see them?

A. I have seen her in the company of Everett Utter's brother in the early part of 1948, but I don't remember seeing——

Q. All right. What was his brother's name?

A. Lish, they call him.

(Deposition of C. H. Strowbridge.)

Q. You have seen her in the company of Lish Utter?

A. Yes.

Q. On a date with him as far as appearances were concerned; is that right?

A. Oh, they just meet up; I can't say he had a date with her.

Q. Actually you have seen her out with a number of different men, have you not, during the fall and winter of 1947-1948; is that not true?

A. I have seen her out with one man in the fall of 1947 because I was with him. [88]

Q. His name, as you have mentioned, is Russell McKenzie?

A. Russell McKenzie, that's right.

Q. Is that the only man you have seen her with in the fall of 1947?

A. That's the only one I can really say had her out.

Q. Russell McKenzie is the only one you can really say had her out in the fall of 1947 to your knowledge?

A. I've seen her stand and talk in the tavern to different men, but to be along with her, I was out with her when Russell McKenzie had her out and that's all.

Q. She has been in your place of business many, many times and danced and drank with your customers, is that not true, that you have observed?

A. At times.

Q. And that was done in the fall of 1947, the summer of 1947, is that not true?

(Deposition of C. H. Strowbridge.)

A. Well, she come there in July, 1947, when I was first starting to build the tavern.

Q. When was it opened?

A. Armistice Day.

Q. In November? A. Right.

Q. Then, you weren't operating prior to that, is that right?

A. The old tavern was running, but I wasn't running it. [89]

Q. Were you in there off and on?

A. I was in there off and on working on this new tavern.

Q. And you saw Eunice in there?

A. Yes. Russell McKenzie was helping build the new one, that's why he was around there a great deal. He was the carpenter there, that's why he was around there until it was finished.

Q. Were there occasions when you asked Eunice to come over from the house to help entertain your customers in a business way and she would come over to the tavern, is that not true?

A. Oh, I might have asked her to come over to the tavern, but I don't remember telling her to come over to entertain anybody.

Q. As a matter of fact, have you not on occasions asked girls from the city of Bemidji to come out to your place to furnish company for guests at your tavern, is that not true?

A. No, I don't believe I ever asked them to come out there for that reason. I have given a few of them a ride out there at different times, but I never

(Deposition of C. H. Strowbridge.)

walked right up to anybody and said, "Come out to my tavern to entertain customers."

Mr. Landoe: I think that is all. [90]

ROBERT HILTZ

called and sworn as a witness in behalf of the plaintiff, testified:

Direct Examination

By Mr. Lanier: [102]

Q. Do you know Ray Koenig?

A. Yes, I do.

Q. Plaintiff in this lawsuit? A. Yes, I do.

Q. Do you know his former wife, the present Mrs. Corcoran? A. Yes.

Q. How long have you known her?

A. Oh, probably 10 or 12 years, probably 12 years.

Q. Do you know the defendant, Corcoran?

A. Yes, I do.

Q. Can you tell me approximately when you first came to know who he was?

A. Well, I can't tell you the exact date.

Q. Well, approximately when?

A. It must have been around the fall of 1947.

Q. In the fall of 1947. Do you recall when the new tavern opened up there on Armistice Day?

A. Yes, I remember when that opened.

Q. 1947? [105] A. Yes.

(Deposition of Robert Hiltz.)

Q. Was it not about that time that you first came to know who he was?

A. Well, I think I had seen him a few days before, but the new place was where I got to know him.

Q. Did you ever see him in the company of Mrs. Koenig in the fall of 1947? A. Yes, I did.

Q. Where? A. At the tavern.

Q. At any other places?

A. No, that was about the only place I was at.

Q. Was at the tavern? A. Yes, sir.

Q. You saw him there in her company. Do you mean by that that they were together and having beer together and things of that kind?

A. That's right.

Q. Did you during the fall of 1947 see her in the residence that has been described here by Mr. Strowbridge near the tavern? A. Yes, I did.

Q. Did you ever during that fall see her in that residence with Mr. Corcoran?

A. No, I can't say I did. [106]

Q. Did you or not in the winter of 1948 see her there?

A. Yes, in the spring, I was around there often.

Q. You say the spring. Were you there in January or February, 1948?

A. No, I wasn't. I was there, but I didn't stay there as often.

Q. Were you there during January or February, 1948, and see Mr. Corcoran, the defendant, and Mrs. Koenig, the wife of Ray Koenig, together?

(Deposition of Robert Hiltz.)

A. Yes, I did.

Q. And where would you see them together?

A. Well, it was usually right near the place, either in the tavern or in the yard.

Q. Do you know whether or not Mr. Corcoran had an automobile during that time?

A. Yes, I do; he did.

Q. Do you know what kind of a car it was?

A. Yes, he had a Chevvie.

Q. Did you ever see her in the car?

A. Yes, I did.

Q. Did you see them in the car frequently or infrequently?

A. I can't say I seen him in the car frequently. I seen him in the car in the yard often.

Q. But you have seen them in the car? [107]

A. Yes, I have.

Q. Have you ever seen them together at any other night clubs besides that night club?

A. I never went to any others.

Q. You never went to the other clubs. Now, after April the third, or early part of April, state whether or not you saw Corcoran around the house there with Mrs. Koenig then?

A. I don't remember.

Q. Now, you don't remember that March and April period, do you?

A. I don't remember seeing them around the house.

Q. Did you see them around the tavern?

(Deposition of Robert Hiltz.)

A. Yes, I have seen them in the tavern.

Q. State whether or not he was there frequently or infrequently during that period.

A. Well, I won't say he was in the tavern, but often I seen his car in the yard.

Q. In the yard outside the tavern?

A. That's right.

Q. You would see them then together?

A. That's right. [108]

* * *

Q. Mr. Hiltz, where do you live?

A. Right now I'm staying in Bemidji part of the time, I live west of town five miles.

Q. In 1947, where were you living?

A. I was living five miles west of town, past the Dutch.

Q. Did you ever live in Clarence Strowbridge's home?

A. Well, I stayed in his home, yes. [109]

Q. When was that?

A. Well, I'd say the last 11 years I've been there nights.

Q. Well, are you staying there now?

A. No, I'm not staying there now.

Q. I mean, when did you last reside there?

A. It's never been my home, I've stayed there off and on. I had to go by there on my way home nights and I'd stop and stay there with him and I still do that today.

Q. That is what I am asking you, do you stay

(Deposition of Robert Hiltz.)

there now? A. That's right, once in a while.

Q. What do you mean by once in a while?

A. Whenever I get out there nights and they close up and I got nothing to do, I stay there over night.

Q. When did you last stay with him?

A. Oh, probably I suppose about a week ago Saturday, I suppose.

Q. A week ago Saturday night, you said you stayed there, "I suppose." Did you stay there then?

A. I think it was. I stay there quite often; I don't remember the exact days; I don't keep track where I stay nights all the time, why should I?

Q. Do you stay there several nights a week?

A. No, not no more; I used to.

Q. Did you stay there several nights a week in 1947? [110] A. No, I didn't.

Q. In 1948? A. Yes, in 1948, I did.

Q. And about a week ago you stayed there with him. Is he a special friend of yours?

A. Yes, that's right.

Q. Are you married? A. No.

Q. How old are you? A. Thirty-three.

Q. Have you been married?

A. No, can't find nothing.

Q. How long have you known Eunice? That is while she was Eunice Koenig?

A. I think I met her about the same time Slats met his wife. Probably 12 years ago I met them, the two sisters, I might have. She was pretty young then, 13 years ago, probably.

(Deposition of Robert Hiltz.)

Q. You met her about 13 years ago?

A. Yes, probably around that.

Q. Where did you meet her?

A. Well, I can't tell you the house. I met her with Slats. I used to run around with him when he was going with his girl friend. I met the rest of the family.

Q. Who was going with his girl friend? [111]

A. Mr. Strowbridge, the guy that was on the stand a minute ago here.

Q. I believe you testified you saw Eunice in 1948? A. That's right.

Q. Did you see her in 1947?

A. That's right.

Q. But you never went anywhere except to the Dutch Tavern, I believe you said?

A. That's about all. I went to shows and around town, certainly, but as far as night clubs, no.

Q. You have seen Eunice in the night club, the Dutchess, in 1948? A. That's right.

Q. What was she doing?

A. Well, I suppose the same as anybody.

Q. What would that be?

A. What's it for?

Q. What would that be?

A. That's to drink beer, I suppose.

Q. Well, now, do you know what it is for?

A. And dance. Yes, that's what I used to go there for, to drink beer.

Q. And what else?

A. Isn't that enough? I don't dance.

(Deposition of Robert Hiltz.)

Q. Well, that isn't the question. [112]

A. I don't dance.

Q. Don't you ever drink any hard liquor?

A. If I got some, yes.

Q. Have you drunk hard liquor in there?

A. I have.

Q. Of course, I am referring now to Eunice, what was she doing in there when you saw her there? Was she drinking beer?

A. That's right.

Q. Was she drinking hard liquor?

A. Can't say, I didn't keep an eye on her that close.

Q. I didn't get the last part of your answer.

A. I say I don't keep an eye on the women that close, they don't bother me that much.

Q. You don't pay any attention to the women?

A. Yes, that's right.

Q. Does that refer to Eunice, too, you didn't pay much attention to what she was doing?

A. That's right.

Q. Well, then, do you know what she was doing in the Dutch Tavern when you saw her in there?

A. I've seen her around once in a while, a guy can't help seeing what's going on once in a while, can he?

Q. Did you see others with her?

A. Yes, I have. [113]

Q. Men? A. Why, certainly.

Q. Various and different men at different times?
I am speaking now of the winter of 1948.

(Deposition of Robert Hiltz.)

A. What do you mean by that?

Q. Well, I mean what I say, did you see her with different men in there?

A. It's only natural.

Q. Well, did you see it?

A. Yes, when you're in a tavern you're going to be with different people.

Q. Well, I mean with her, was she drinking with different men? A. I can't say.

Q. Do you know whether on any of these occasions that you saw here there she had a date with anybody? A. No, I cannot.

Q. All you know is that you saw her there, is that it? A. Yes, I have saw her there.

Mr. Landoe: That is all. [114]

* * *

“Roland F. Suckert, called and sworn as a witness in behalf of the plaintiff, testified:

Direct Examination

By Mr. Lanier:

* * *

Q. And where did you stay at that time?

A. I stayed in the house, in the residence.

Q. That is the residence that has been described here by Mr. Strowbridge? A. Yes.

Q. What room there did you occupy in that place?

A. Well, whenever his wife was home, I slept upstairs and when she wasn't I slept with him.

(Deposition of Roland F. Suckert.)

Q. You slept with Mr. Strowbridge?

A. Yes.

Q. Now, do you know Mrs. Corcoran, the former Mrs. Koenig? A. Yes.

Q. During the time you were there beginning with February 1st, 1948, state whether or not she, Mrs. Koenig at that time, was there? A. Yes.

Q. Do you know this man, Mr. Corcoran, the defendant in [116] this case?

A. Yes, I know him.

Q. When did you first come to know who he was?

A. Well, when I first come there, I heard about him all the time. It was sometime before I met him socially—I mean, introduced.

Q. Well, did you meet him sometime in the early part of February or latter part of February, or when?

A. Probably the latter part of February, thereabouts.

Q. The latter part of February. And state whether or not you have seen him and Mrs. Koenig together as of that date?

A. Yes, I have seen them together.

Q. State whether or not you saw them in an automobile, Mr. Corcoran's? A. Yes, I have.

Q. And where would that be in this automoblie?

A. They would park out there until she [117] got ready to go in.

Q. And by out there, you mean——

(Deposition of Roland F. Suckert.)

A. Out in the yard.

Q. Near the tavern?

A. Well, between the tavern and the house, just in the yard there.

Q. Did that occur frequently or infrequently?

A. Frequently.

Q. And what time, do you know, they would usually park there?

A. Oh, it varied, but I remember they usually did close to closing-up, about 1:30 or so, or go into town and we would come back and it would be anywhere from two to four in the morning and that was quite a few times they was out there then yet. I didn't know when they would come in.

Q. After you would close up and go to town, what did you do that for?

A. To go in to get something to eat.

Q. That is, the force that worked at the tavern did that? A. Yes.

Q. And when you would come back you would see them [118] sometimes, they would still be there, is that it? A. Yes.

Q. During the time you were there, Mrs. Koenig slept in the house, the same place that you did, did she? A. Yes.

Q. Which room did she occupy there, upstairs or downstairs? A. Upstairs.

Q. State whether or not during that period that you were there, in February or March, you came in there and saw both of them in the cottage, did you see that?

(Deposition of Roland F. Suckert.)

A. Well, that was in the residence, in the house there I seen them.

Q. I am talking about in the residence.

A. Yes, I seen them.

Q. About what time of night did you come in?

A. Oh, I have come in there after I closed up and the boss is gone.

Q. In other words, Mr. Strowbridge wasn't there? A. No.

Q. Was that after his wife had left?

A. Gosh, I can't say.

Q. Was she there on this particular night I am asking you about?

A. No, his wife wasn't there [119]

Q. Mr. Strowbridge wasn't there? A. No.

Q. Well, when you came in, who did you find there? A. I found Eunice and Corcoran.

Q. And what were they doing?

A. Well, they were just laying on the bed.

Q. The bed or davenette?

A. I would say both places.

Q. You say you saw them on the bed; was that upstairs or downstairs? A. Downstairs.

Q. And what were they doing, what did they say to you or what did you say to them?

A. I asked them what they was doing, and they said, "You go upstairs and sleep" because I was sleeping downstairs.

Q. They were in the bed you usually occupied?

A. That's right.

Mr. Lanier: You may cross-examine.

(Deposition of Roland F. Suckert.)

Mr. Landoe (Reading): Cross-examination by Mr. Landoe:

Q. This first time you saw Don Corcoran was in the latter part of February, 1948?

A. It was thereabouts.

Q. Could it have been March?

A. Possibly. [120]

Q. Could it have been April?

A. No, no, it was before that.

Q. Either February or March, 1948, is that correct? A. Yes, it was in there some place.

Q. Where were you living at that time?

A. Strowbridge's residence.

Q. What was your occupation?

A. Oh, I was just cleaning up around there and waiting tables.

Q. Whereabouts? A. In the tavern.

Q. In the Dutchess Tavern?

A. That's right.

Q. Is that the place that was run by Clarence Strowbridge?

A. Well, he was the boss, he didn't have the license.

Q. But the place he operated nevertheless, is that correct? A. Yes.

Q. How long did you work out there?

A. Oh, off and on for about five years; not quite that long, I guess, it has been since 1948.

Q. Well, you worked out there for at least five years, haven't you? A. Thereabouts, yes.

(Deposition of Roland F. Suckert.)

Q. In 1948, how old were you? [121]

A. I was 18, I guess, or 19.

Q. How old are you now? A. 22.

Q. When was your birthday?

A. March 10th.

Q. You were 22 on the 10th of March——

A. Yes.

Q. Of 1950, is that it?

A. Yes, 1950. I'll be 23 now in a few more days.

Q. You started working out there for Clarence when you were about 16 years old, isn't that true?

A. No, it's not. [122]

* * *

RAY P. KOENIG

the plaintiff, called as a witness on his own behalf,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Lanier: [139]

* * *

Q. During all of this time, did you have affection and love for your wife? A. Yes, I did.

Q. Was there every indication she had the same for you? A. She did. [149]

* * *

Q. During the period from July, 1947, and coming down now to November of 1947, state whether or not your wife did visit you on week ends?

A. Yes, she did.

Q. At Brainerd? A. Yes.

(Testimony of Ray P. Koenig.)

Q. When she did, where did you stay?

A. Ransord Hotel, I had a room there.

Q. State whether or not you would alternate with her on visits, and visit her at Bemidji on week ends?

A. Yes.

Q. State where she was staying at Bemidji at that time?

A. She was staying with her sister, Mrs. Strowbridge.

Q. Mrs. Strowbridge, her sister? A. Yes.

Q. During all this period of time, state whether or not you were supporting her?

A. Yes, I was.

Q. How much were you giving her?

A. Approximately \$80 a month.

Q. She was staying with her sister?

A. That's right.

Q. Did she have any expenses at her sister's home that you know of? [150]

A. I don't know.

Q. You alternated, she would either come to Brainerd, or you would go to Bemidji on week ends?

A. Yes, sir.

Q. Right here, before I forget it, during this time, say the last five-year period, how many days off have you had from work?

A. Not over 10.

Q. In the last five years? A. That's right.

Q. What are you doing now?

A. I am service manager for W. W. Walwark, Fargo.

(Testimony of Ray P. Koenig.)

Q. Do you know what the magnitude of that firm is with regard to the Ford setup?

A. The largest Ford dealer in the Northwest.

Q. They have offices where?

A. Moorehead and two offices in Fargo.

Q. What are your duties?

A. Supervising shop operations and personnel.

Q. How many men have you?

A. Approximately 20 or 21.

Q. Now, we have got over to November, 1947.

In November, 1947, did this visitation between you and your wife between Brainerd and Bemidji continue? A. Yes, it did. [151]

Q. Now, at that time, say the latter part of November, did you or not notice any difference in the relationship of your wife to you?

A. Yes, I did.

Q. What was that difference?

A. Sort of a cooling effect, you might say.

Q. How did it evidence itself on her part?

A. Well, that is hard to explain. She didn't act the same towards me.

Q. Did she have any reasons why she didn't?

A. Not that I knew of.

Q. Did she say anything about why she didn't?

A. No, she didn't.

Q. Did you continue to make your visits from the latter part of November, on up until Christmas Eve; did you continue to make weekly visits or she make weekly visits to you at Brainerd?

A. Yes, she did.

(Testimony of Ray P. Koenig.)

Q. State whether or not you were in Bemidji with her on Chirstmas Eve night?

A. Yes, I was.

Q. Where?

A. At the Strowbridge residence.

Q. Who was there that night?

A. Mr. Strowbridge, Marian, Jackie, their son, my wife, [152] Eunice, myself, and my boy, Terry.

Q. That was in 1947? A. That's right.

Q. What, in preparation for that visit, did you do with respect to obtaining Christmas presents?

A. I bought some gifts.

Q. For whom?

A. For my wife and child.

Q. What did you buy for your wife?

A. I believe it was a robe set, a pajama and robe set and a pair of stadium boots.

Q. Did you get some things for the boy?

A. Yes, a sled.

Q. At that time, were those presents given away that night? A. That's right.

Q. After that, what happened among you people?

A. After the gifts were opened and the children played with them, and afterwards, they went to bed. Mr. Strowbridge went to midnight Mass, and, therefore, left I and my wife alone.

Q. Then, was anything said by her with regard to her affections for you?

A. She told me at that time she no longer loved me.

(Testimony of Ray P. Koenig.)

Q. Was that or not the first time she had ever told you that? A. That is correct. [153]

Q. Then, after that you went back to Brainerd?

A. That's right.

Q. Then, when did you next see your wife?

A. Sometime in January.

Q. Where? A. At Bemidji.

Q. Did she come to Brainerd any more?

A. Yes, she did.

Q. Week ends? A. That's right.

Q. Did she bring up this subject any more?

A. Sometimes, yes.

Q. Now, in January, when you saw her there, was something said there at that time in regard to this matter?

A. She wasn't sure as to whether or not she wanted a divorce.

Q. She discussed the matter of divorce?

A. That's right.

Q. Now, during this time from that Christmas Eve on, were you supporting her?

A. Yes, I was.

Q. And with regard to your affections for your wife, were they still alive in you? A. Yes.

Q. Did you still want a home with her presiding over it? [154] A. That's right.

Q. Were you still capable and able of taking her home and taking care of her?

A. That's right.

Q. In May, 1948, a divorce was granted?

A. That's right, sir.

(Testimony of Ray P. Koenig.)

Q. Now, after that divorce, state whether or not you learned for the first time of her relationship and association with the defendant?

A. Shortly after the divorce was granted, I learned that.

Q. Before that, had you learned anything about it? A. No, sir, I hadn't.

Q. Had you ever seen him to your knowledge before that? A. No, sir.

Q. During this period of separation on account of the housing situation, had you felt that everything was all right and regular?

A. That's right.

Q. What year did you go into the army?

A. 1942, August.

Q. August. Now, do you know whether or not your wife subsequent to that divorce married the defendant? A. Yes, she has.

Q. And is his wife now?

A. That's right. [155]

* * *

Cross-Examination

By Mr. Landoe: [156]

* * *

Q. By whom were you married?

A. A Judge Oliver.

Q. What kind of a Judge was he?

A. He is District Judge, I believe.

Q. Wasn't he a Justice of the Peace?

(Testimony of Ray P. Koenig.)

A. No, I don't think so.

Q. Now, at that time, on that day, how long had it been prior to that that you had decided to get married?

A. February 25, I believe.

Q. You didn't have any engagement, I don't suppose?

A. No.

Q. You didn't announce your marriage to anyone?

A. No, sir.

Q. Do you know what the waiting period in the State of Minnesota was at that time before you could get married after you applied for the license?

Mr. Lanier: Objected to as irrelevant and immaterial.

Mr. Landoe: It is preliminary to other testimony.

Mr. Lanier: Unless they challenge the marriage.

The Court: What difference does it make?

Mr. Landoe: I would like to go into it to show the relationship existing at that time as well as all subsequent times. [157]

The Court: I don't see (interrupted).

Mr. Landoe: Counsel has asked what the relations were from the time they were married.

The Court: From the time they were married. Let's go into that.

Q. (By Mr. Landoe): Was this marriage, then, something in the nature of a secret marriage?

A. Somewhat, yes.

Q. Where were you living at the time you were married?

A. Living with my father in Bemidji.

(Testimony of Ray P. Koenig.)

Q. As a matter of fact, weren't you living with Eunice's sister's husband, Clarence Strowbridge?

A. When I got married?

Q. Yes. A. No, sir.

Q. Where did you live after you got married?

A. With my father part of the time, and also with Clarence Strowbridge.

Q. You said you left on a trip. When was that?

A. I believe it was in April.

Q. What part of April?

A. That I don't remember.

Q. Could it have been about the 5th of April, 1942?

A. It could have been, or it could have been the 15th, I don't remember. [158]

Q. Anyway, it was about a month after you were married? A. I think so.

Q. During that month, did you live part of the time with Clarence Strowbridge? A. Yes.

Q. How much of that time did you live there?

A. That is hard to say, it has been a long time ago.

Q. But you lived there for several days at that time? A. Possibly, yes, sir.

Q. Where was Eunice living at the time you married her?

A. With her sister, Marian, I believe.

Q. Marian Strowbridge? A. That's right.

Q. You hadn't been going with her, you didn't consider her as your steady girl friend up until a week before you married her? A. Yes, I did.

(Testimony of Ray P. Koenig.)

Q. You were going with various girls up until a week before you got married?

A. No, sir, I didn't.

Q. You were practically engaged to a girl by the name of Evelyn Monkman?

Mr. Lanier: It is immaterial; not throwing any light on any issue material in this case.

The Court: I will overrule the objection. You established a [159] sweetheart situation from the time he was a young boy. We will find out about it as long as you brought it in.

Q. As a matter of fact, state whether or not it is true, Mr. Koenig, that you were out all night with Evelyn Monkman six days after you were married to Eunice? A. No, that is not true.

Q. And that you spent that night in a garage in the City of Bemidji?

A. That is not true.

Mr. Lanier: Just a minute, if the Court please, object to that line of examination as immaterial and move to strike all that testimony going into the question of whether he spent a night out with a woman during that period as too remote.

The Court: Do you want to make an argument, do you really question those?

Mr. Lanier: That is my position.

(Jury admonished and left courtroom.)

The Court: On what ground do you say this is immaterial?

Mr. Lanier: It is an attempt to show an im-

(Testimony of Ray P. Koenig.)

proper relationship on his part with another person, another woman, at a time that is remote from this case, because the evidence is so far that they lived together as husband and wife in happiness for many, many years.

The Court: That is the very point of the thing; you established the many, many years; you went from the beginning of the [160] marriage into the marriage relationship. Of course, it is competent and material to show what that relationship was and whether or not the acts of the plaintiff himself were the cause of any alienation of affections. Isn't that so, isn't that admissible, isn't that material?

Mr. Lanier: I take it, if the Court please, it is highly remote, it is going back many years preceding the time during which they lived together happily.

The Court: You say it is happily. Now we are going to find out. Isn't that the point of the thing?

Mr. Lanier: I take it, if the Court please, at no time in the examination did I go into improper conduct of his wife or himself.

The Court: No, you said there wasn't any.

Mr. Lanier: My objection is this is remote, immaterial and not proper cross-examination.

The Court: Of course, if it is a single instance, I might agree with you. Are you going to show a course of conduct?

Mr. Landoe: No, the entire marriage period.

(Testimony of Ray P. Koenig.)

The Court: You are going to show a course of conduct?

Mr. Landoe: Yes.

The Court: Very well, the objection is overruled. Call the jury back in.

(Jury returns to courtroom.)

Q. (By Mr. Landoe): Now, I will ask you, Ray, when it was [161] that you went into the service, I know you testified to it?

A. I was sworn in August 18th. I left for Fort Snelling September 1st.

Q. 1942? A. That's right, sir.

Q. And you were mustered out of the army on what date? A. October 29, 1945.

Q. October—again the date, please?

A. 29th, 1945.

Q. And the time Eunice left Brainerd to go up to Bemidji was what date?

A. July 1, 1947.

Q. The period of time that you and Eunice, your wife, lived together from the time you were married on March 8, 1942, would be approximately two years, isn't that correct?

A. No, it is more than that.

Q. That you actually lived together in the same abode?

A. No. We lived together probably six months before I went into the service, isn't that right?

Q. Yes.

(Testimony of Ray P. Koenig.)

A. And from November, 1945, until July 1, 1947.

Q. About 26 months altogether. Now, you say you went to Longview, Washington, in the forepart of April, 1942?

A. Sometime, I believe it was in April.

Q. How did you travel? [162]

A. I had an automobile.

Q. Who went on this trip?

A. My wife and a fellow by the name of Donald Schwartz.

Q. Who was Donald Schwartz?

A. A young fellow that lived in Bemidji.

Q. Was he a pal of yours?

A. I would say he was a friend.

Q. Who else went on this trip?

A. That is all.

Q. Didn't Eunice go?

A. Yes, I said my wife.

Q. I beg your pardon. And you went to Longview, Washington? A. That's right.

Q. You left Washington what month?

A. Sometime in June, I believe; it could have been July, I don't remember.

Q. In the month of May, did your wife have any illness in the State of Washington?

A. Yes, sir.

Q. What was the cause of the illness?

A. She had a miscarriage, sir.

Q. Did she go to the hospital?

A. Yes, sir.

(Testimony of Ray P. Koenig.)

Q. Was she quite sick?

A. Yes, very sick. [163]

Q. She had a doctor in attendance?

A. That's right.

Q. And that was approximately in the month of May, 1942?

A. Yes, sir, I think so.

Q. When you returned from Washington, which route did you travel?

A. The highway number?

Q. Did you go through the State of Idaho on your way back to Minnesota?

A. Yes, sir.

Q. Did you stop in a little town called Kamiah, Idaho?

A. Yes, sir.

Q. Whom did you visit in Kamiah, Idaho?

A. A cousin of mine.

Q. What was his name?

A. Ray Tier.

Q. Who was with you at that time?

A. The same fellow that went out with us.

Q. Don Schwartz?

A. That's right.

Q. And your wife, Eunice?

A. That's right.

Q. Do you know a little town that is called Orofino?

A. Yes, sir.

Q. How far is it located from Kamiah? [164]

A. 20 miles, maybe.

Q. Do you recall the date you came into Kamiah, Idaho?

A. No, I don't.

Q. The month?

A. Possibly June.

(Testimony of Ray P. Koenig.)

Q. June, 1942? A. I believe so.

Q. How long were you in the State of Idaho?

A. Two days, I believe.

Q. State whether or not it is true that on your second night in the town of Orofino, Idaho, your wife caught you in a house of prostitution?

A. That is true in one extent.

Q. Were you there? A. That's right.

Q. Did your wife see you there?

A. That's right.

Q. Did she take her bags out of your car and leave you at that time? A. No, she didn't.

Q. Or try to leave you? A. No.

Q. Do you recall the occasion?

A. Yes, I do.

Q. State whether or not it is true that when your wife caught [165] you in this house of prostitution that you left her and got in your car and drove away from her and drove down to a beer tavern?

Mr. Sutton: Object to that; it has already been answered.

The Court: Overruled.

A. She didn't go with me.

Q. She didn't go with you?

A. That's right.

Q. Did you go to a beer tavern?

A. I drove to a night club.

Q. Did your wife follow you in another car?

A. That's right.

(Testimony of Ray P. Koenig.)

Q. Did she approach you and tell you she wanted her suitcases? A. I don't believe so.

Q. As a matter of fact, state whether it is true that you got her suitcases and threw them at her in the road? A. No, sir.

Q. Is it true she got her suitcases and proceeded walking down the highway?

A. She did not take any suitcase.

Q. Is it true you drove down the highway and forced her to get in the car?

A. I didn't force her; I asked her. [166]

Q. I'll ask you whether or not she was laying in the highway at the time you picked her up?

A. No, she was standing on the highway when I picked her up.

Q. When did you get back to the City of Bemidji on this trip? A. Sometime in June.

Q. Sometime in the first part of June or the latter part of June? A. I don't remember.

Q. Could it have been in the last week of June, 1942?

A. It could have been, or it could have been the first.

Q. Now, let's get it as near as you can remember. A. That is as near as I can recall.

Q. It could have been the first part of June or the last part of June?

A. That's right, 1942, nine years ago.

Q. Did you take another trip after that to the State of Washington, the same summer?

(Testimony of Ray P. Koenig.)

A. That's right.

Q. The same summer you were married?

A. That's right.

Q. How long after you got back from the first trip did you take the second trip to the State of Washington.

A. In August, I believe, wasn't it?

Q. I don't know. Is that correct? The first part of [167] August or the last part of August?

A. It must have been the first part.

Q. You don't recall, but you did take another trip?

A. That's right.

Q. Who went with you?

A. Mr. Strowbridge and a fellow by the name of Ted Hiltz.

Q. Who is Strowbridge married to?

A. Eunice's sister, Marian.

Q. Clarence Strowbridge, he is the party who was married to Eunice's sister. They are now divorced, are they not?

A. That's right.

Q. The other boy's name was Ted Hiltz?

A. That's right.

Q. Did your wife go on that trip?

A. No.

Q. Just you three fellows?

A. That's right.

Q. You say that was in the month of August, 1942?

A. Yes.

Q. Where did you go?

A. We went to Longview, Washington.

(Testimony of Ray P. Koenig.)

Q. Prior to the time you took this trip, state whether or not it is true that on one occasion after you arrived back in Bemidji, late at night, you, in the company of Donald Schwartz and one other male person, had a date with three women in [168] an automobile; that you went into the house of Clarence Strowbridge where Eunice was then staying, your wife, to get your coat, and that she started to ask you where you were going, and you locked her in a room and turned the lock on the door? A. No, sir.

Q. That her sister released her, and she came out and saw you in the car with three women?

A. That is an absolute untruth if I ever heard one.

Q. That never happened? A. No, sir.

Q. I'll ask you whether or not on that occasion you had a date with a girl by the name of Shirley Peterson? A. I don't know her.

Mr. Sutton: Object to this examination, the questions are coming too fast.

The Court: The witness doesn't seem to be having any trouble, Mr. Sutton.

Mr. Sutton: The questions are interposed before the answer comes out.

The Court: Proceed.

Q. You don't know a girl by the name of Shirley Peterson?

A. No girl by the name of Shirley, but I know

(Testimony of Ray P. Koenig.)

a girl by the name of Jerry Peterson that could be the one you are referring to.

Q. She could have been the girl? [169]

A. I have never been out with her, if that is what you are referring to.

Q. Now, then, on this trip you took with these two fellows, Clarence Strowbridge, and who was the other one? A. Ted Hiltz.

Q. Ted Hiltz is what relationship to—what is his brother's name?

A. Robert. He has several brothers, but (interrupted).

Q. Robert. State whether or not it is true during the time you were on this trip that you sent a postal card to two sisters whose names were June Keller and Betty Keller, and on this card that you said, or words to this effect: "It is mighty hot out here, but not near as hot as some stuff we know back in Bemidji. Love, Ray and Slat's"?

A. No, sir, I wrote that card for Ted Hiltz and Clarence Strowbridge.

Q. You wrote the card? A. That's right.

Q. You sent it to two girls called June Keller and Betty Keller, is that correct?

A. It is possible.

Q. You know it is true, and your wife saw that card?

A. It was in my handwriting; that is the reason why she thought I had something to do with it.

Q. Isn't it true that the signatures were placed

(Testimony of Ray P. Koenig.)

under the [170] stamp, at the right hand corner, and there was a note on the card to look under the stamp?

A. No, sir, not that I remember.

Q. June Keller was one of your girl friends, wasn't she?

A. I have never been out with June Keller in my life.

Q. Alice Stetten was one of your girl friends?

A. I have never been out with her; I can't even place the girl in fact.

Q. Would you recognize her more by the name of the Sheepherder?

A. No, sir, I have never taken her out in my life.

Q. You know who she was?

A. Yes, I do. In fact, my brother went with her is the only connection I ever had with her, my oldest brother, Clarence.

Q. I am referring now, when speaking of these girls, to the fall and spring of 1947.

A. 1947?

Q. I mean of 1942, I beg your pardon. I mean immediately after your marriage until after you went in the army.

A. That's right.

Q. Jackie Tell, did you go out with her?

A. No.

Q. Dorothy Teller?

A. Not when I was married.

Q. Kitty Nound? [171]

(Testimony of Ray P. Koenig.)

A. Never when I was married.

Q. I will ask you whether or not you recall an occasion, which you have denied, that you were out with three girl friends, the one of which you have referred to as Jerry Peterson, whether or not the following day you saw Eunice in the Dutchess Tavern about noon? A. Yes.

Q. In the month of August, 1942. Do you recall that occasion that I am speaking of?

A. I was in the tavern a lot.

Q. Do you recall an occasion when you came into the tavern about noon, when your wife, Eunice, was standing there with her sister, Marian, and there was present Donald Schwartz, and an iceman, a man who handles ice, and a bartender, during which you and your wife had an altercation, do you recall that? A. No, I don't.

Q. Now, I refer to a time that you came in there, and you saw her, and you walked up to her, struck her, and knocked her back under the tables?

A. That is not true.

Q. That is not true?

A. That's right.

Q. Do you recall whether or not there was such an occasion and Donald Schwartz brought her to and carried her into the house adjoining Clarence Strowbridge's. [172]

A. I slapped her because she called me a name that reflected on my mother that died about a year previously.

(Testimony of Ray P. Koenig.)

Q. So you do recall the occasion?

A. If that is the one you are speaking of.

Q. I am speaking of the occasion when you hit her with your fist and knocked her 15 feet and under some bar tables?

Mr. Sutton: Just a minute, that assumes a state of facts not in the record.

The Court: He is cross-examining the witness. Proceed. Objection overruled.

Q. That happened, is that true?

A. I never hit her with my fist in my life.

Q. What did you hit her with?

A. I slapped her. I cautioned her several times before, and she called me that name repeatedly.

Q. It is true you knocked her off her feet?

A. She never went off her feet.

Q. It is not true that Donald Schwartz had to bring her to and carry her into the house, is that correct?

A. No, sir, it is not.

Q. I will ask you whether or not it is true that a few days thereafter, a few days, and prior to the time you went into the service, and within a few days of the time you went into the service, that your wife, while you were present, tried to commit suicide [173]

A. No, sir.

Q. You don't recall that?

A. No, sir.

Q. I will ask you whether or not you were present on an occasion in the house of your brother-in-law then, Clarence Strowbridge, when your wife

(Testimony of Ray P. Koenig.)

went into the bathroom, and you were present, and took a bottle labeled "Poison, for External Use Only," and that you came in and your brother-in-law came in and found her laying on the floor of the bathroom?

A. Before I went in the Army?

Q. Yes. A. That is not true.

Q. That is not true? A. No, sir.

Q. Well, let's say several days before you went in the army? A. No, sir.

Q. And that at that time and place there was present her sister, Marian, and Donald Schwartz?

A. No, sir.

Q. And I will also ask you whether or not at that time she had informed you she had just found out she was pregnant?

A. No, sir, she didn't, no, sir. She told me about being pregnant, but never about taking any poison.

Q. When did she tell you about being pregnant? [174]

A. Shortly before I went in the army.

Q. You are not aware of the fact she tried to take her life? A. No, sir.

Q. Did you return after you entered the service on any furlough?

A. Yes, in November, I believe, I came home on furlough. I had been in the hospital; I got sick leave.

(Testimony of Ray P. Koenig.)

Q. You had been in the hospital in Virginia, is that correct?

A. That's right, she was out there with me.

Q. You had sent for her? A. Yes.

Q. Did you return on furlough in the latter part of March, 1943?

A. Latter part of March?

Q. Yes. A. No, sir.

Q. Did you return on furlough preceding the time your son was born, Terry? A. Yes, sir.

Q. When did you return?

A. I believe the last of February.

Q. The last of February, very well. When did you arrive in Bemidji?

A. The exact date I don't know, around the first of March.

Q. When was Terry born? [175]

A. March 8th.

Q. What was the date?

A. March 8th.

Q. Are you sure of that?

A. March 8th, yes, sir, either the 8th or 10th.

Q. Could it be April 10th?

A. Yes, when Terry was born was April 10th.

Q. April 10th, 1943?

A. Right. Then I came home the last of March.

Q. That is the time I am speaking of. Did you come home the latter part of March?

A. It must have been, yes.

Q. Where was your wife living at that time?

(Testimony of Ray P. Koenig.)

A. With my father.

Q. With your father? A. And sister.

Q. And your sister. Do you recall the time when your son was born, the day?

A. Yes, sir, April 10th.

Q. Now, I will ask you to take your mind back to the day before your son was born, on the 9th?

A. Yes.

Q. The 9th day of April, 1943. State whether or not it is true that you were out most of the night with a girl by the name of Veronica [176] Shadio? A. That is not true.

Q. Whose present name is Veronica Helopsik. You know her, do you not? A. Yes, I do.

Q. You say you were not out with her?

A. Not on the 9th.

Q. What day would you say it was?

A. I was never out with her. I had a drink with her on the 10th celebrating my being a father.

Q. That was the night your son was born.

A. He was born in the morning, I beg your pardon.

Q. In the morning of the 10th?

A. The 10th.

Q. But the night of the 10th you were out with her until daylight in the morning, as well as the night of the 9th. You were out with her two nights in a row? A. No, sir.

Q. I will ask you where your wife was on the night of the 9th of April, 1943?

(Testimony of Ray P. Koenig.)

A. She was home.

Q. State whether or not it isn't a fact that that night she went to visit her sister, Marian Strowbridge at her home adjoining the Dutchess Tavern, is that true?

A. No, she didn't.

Q. She wasn't there? [177]

A. The night before she went to the hospital, I am sorry, but she wasn't.

Q. The night before she went to the hospital?

A. That's right.

Q. How about the night before that?

A. I don't know about that.

Q. The night before she went to the hospital, would that be April 10?

A. No.

Q. That would be the night afterwards. I am speaking of April 9th.

A. She went to the hospital about ten o'clock of April 10th. Terry was born on the 10th.

Q. I am speaking of the 9th. Isn't it true she stayed with her sister, Marian Strowbridge, that night?

A. No, sir, she stayed at my father's home.

Q. And that you got in at six o'clock in the morning, and she was still waiting up for you?

A. No, sir.

Q. That is not true?

A. No, sir, not six o'clock in the morning.

Q. What time was it?

A. The previous night she told me to go out and see Marian and Slats because I had been sitting home all the time waiting for the baby to be born,

(Testimony of Ray P. Koenig.)

so I went out to the tavern that [178] night. There was no Veronica Shadio at all. In fact, I got in a fight because someone called my wife a dirty name and insulted the uniform I was wearing.

Q. Are you quite a fighting man?

A. No, sir.

Q. You get into fights quite frequently, don't you?

A. I have been in three my entire life.

Q. You have exercised yourself upon your wife quite frequently, isn't that true? A. Once.

Q. When did you return to the service, Ray?

A. The day after my child was born.

Q. The very next day after the child was born?

A. That's right.

Q. And the night of the day your child was born, you were drinking in the tavern, you say?

A. Right.

Q. What time did you get in that night?

A. I would say about two o'clock.

Q. You would say it would be closer to six o'clock in the morning, wouldn't you?

A. No, sir, I say two.

Q. And the night before, what were you doing the 9th of April, 1943?

A. I just told you. [179]

Q. Tell me again.

Mr. Sutton: Objected to as having been answered already.

The Court: Overruled.

(Testimony of Ray P. Koenig.)

A. I was out to the tavern. Marian was there, Mr. Strowbridge was there.

Q. Who else was there?

A. No one that I remember.

Q. Veronica Shadio was there?

A. She was not.

Q. You took her home, didn't you?

A. No, sir, I didn't.

Q. Now, then, did you return after you went back to the service on any further furloughs before you were mustered out of the army?

A. I had one furlough before I shipped overseas.

Q. State whether or not on that occasion you wired your wife and asked her for some money so you could come home?

A. That's right.

Q. I will ask you whether or not she sent it to you?

A. She did.

Q. Isn't it a fact she never even answered the wire?

A. She did send money.

Q. Isn't it a fact that Clarence Strowbridge sent you the money?

A. No, sir, she did. [180]

Q. You came back to the United States on what date?

A. September 4th, I believe, 1945.

Q. 1945.

A. To New Wellington, Delaware, airfield.

Q. Where was your wife at that time?

A. Kingston, Tennessee.

Q. State again where you landed?

A. New Wellington, Delaware. That is an airport.

(Testimony of Ray P. Koenig.)

Q. That is on the Eastern seacoast of the United States, is it not? A. That's right, sir.

Q. When did you arrive in Bemidji, Minnesota?

A. On the 6th, I believe.

Mr. Lanier: If the Court please, just a minute. Upon all the grounds heretofore assigned, we object to this detailed examination; it is entirely far off the issues in this matter.

The Court: Overruled. Proceed.

Q. When did you arrive in Bemidji, Minnesota?

A. I believe it was the 6th.

Q. Of what month again? A. September.

Q. September, 1945? A. That's right, sir.

Q. Were was your wife during that time, do you know? [181]

A. She was in Bemidji, Minnesota, when I arrived there.

Q. She was in Bemidji, Minnesota. What was her physical condition?

A. She had been sick previous to that quite some time.

Q. What had caused her illness?

A. I don't know.

Q. Didn't you inquire?

A. She said something about getting sick in a war plant; she had been working.

Q. Where had she been working?

A. The atomic bomb plant at Oak Ridge, Tennessee.

Q. She had been working for what period?

(Testimony of Ray P. Koenig.)

A. I don't know how long. She never did tell me while I was overseas what she was doing. It was a military secret.

Q. State whether or not she returned to Oak Ridge, Tennessee, after you returned to Bemidji?

A. She got a leave of absence, she couldn't quit.

Q. She went back to Tennessee to go to work?

A. Yes, she couldn't quit.

Q. Just answer the question. Did she go back to Tennessee to go to work? A. Yes.

Q. When did she return to Bemidji?

A. In November.

Q. What year? [182] A. 1945.

Q. State whether or not on that occasion she had just sustained a severe physical accident to her arm? A. That's right, her left arm.

Q. Previous to her coming to Bemidji?

A. That's right.

Q. An accident she sustained after she went back to Tennessee, is that correct?

A. That's right, while I was in the service.

Q. Then she returned to the City of Bemidji. Where was her son Terry during this time, was he with her in Tennessee? A. Yes, sir.

Q. And for what period was she physically disabled, if you know, from this injury to her arm?

A. Her arm bothered her for a long time after that.

Q. Several months? A. I would say so.

Q. During which time she was unable to work, is that correct? A. Yes.

(Testimony of Ray P. Koenig.)

Q. And so she lived with you, is that right?

A. That's right.

Q. I believe you testified that until the early part of January, 1946, you were in Bemidji?

A. That's right. [183]

Q. Then you moved up to Brainerd?

A. Yes.

Q. Tell us where you lived there?

A. 312 Quincy Street.

Q. What was the nature of the habitation?

A. It was a small building, house.

Q. How many rooms? A. Two.

Q. How large rooms?

A. Probably 20 by 20, each of them.

Q. State whether or not it was a converted garage? A. I don't know that.

Q. In the rear of a residence?

A. That's right, it was in the rear of a residence.

Q. Which had formerly been used for a garage, but had been fixed up so as to be livable?

A. I don't know whether it was a garage or not.

Q. Who was your landlord?

A. Merle Dougherty.

Q. His wife's name is Alice Dougherty, is that correct? A. I think so.

Q. They have a daughter by the name of Nona Wilson, is that correct? A. Yes.

Q. You lived there from January 15th to what date? [184] A. July 1, 1946.

Q. During that period of time, state whether

(Testimony of Ray P. Koenig.)

or not you recall Eunice's sister, Arlene, visited at that place? A. Yes, I believe she did.

Q. Did she stay for a few days?

A. Probably a few weeks, I don't remember.

Q. You don't recall. And then on July 1st, do I understand you to say you moved from that place to a cottage on the lake? A. That's right.

Q. How many miles out of Brainerd was that located?

A. You mean from town, the city limits, or what?

Q. Just approximately how far out of town?

A. One mile.

Q. From the city limits?

A. Yes, and probably one and a half miles from the downtown area.

Q. A mile and a half from the downtown area. Describe that cottage.

A. It was a lake cottage, right on the edge of what is called Rice Lake. It was owned by Mr. Harold Yde.

Q. How many rooms in it?

A. A one-room affair. Everything was built in, with a sectional kitchen, living room, fireplace, dressing place, shower. [185]

Q. It was a one-room cottage?

A. That's right.

Q. By the way, what rental were you paying for the place you had over at Dougherty's?

A. I don't remember.

Q. Was it \$12 a month?

(Testimony of Ray P. Koenig.)

A. I think more than that.

Q. Was it \$15?

A. I think it was more than that.

Q. You don't recall exactly? A. No.

Q. What was the rental on the cabin you had over at the lake? A. \$35 a month.

Q. I will ask you whether or not during the period you lived over by the lake, your wife, Eunice, went to work and was working? A. Yes.

Q. Where did she work, if you recall?

A. She worked at the Rainsford Hotel, doing some bookkeeping work, records or something.

Q. Do you recall she had any other employment in addition to that?

A. Sometimes she worked part time at the Thrifty Drug Company. [186]

Q. She worked at least at the Drug Company, is that correct, and then she worked as bookkeeper at the Rainsford Hotel? A. Yes, sir.

Q. Did she work at one place or the other up until the time she left around the 1st of July, 1947?

A. She never worked steady at either place, I don't believe.

Q. But she worked as she was called?

A. She worked only when her sister Arlene was staying with us. I believe that was for a period of about nine months.

Q. When she had someone to look after the child, then she worked; is that correct?

A. That's right, that's correct.

(Testimony of Ray P. Koenig.)

Q. You said Mr. Yde was landlord of this cottage?
A. That is correct.

Q. He gave you notice to vacate, isn't that true?

A. That's right.

Q. There has been quite a bit of testimony here about the cottage being sold. Do you have any knowledge that the cottage was ever sold?

A. I don't think it was sold, but that is what he told me.

Q. That the cottage was sold when he gave you notice. He didn't want you there any more; isn't that true?
A. Possibly. [187]

* * *

DEFENDANT'S MOTION FOR ORDER DISMISSING ACTION

Mr. Landoe: At this time, if the Court please, defendant moves for an order dismissing the action now pending before this Court upon the ground that under all the facts and the law, the plaintiff has shown no right to relief.

Mr. Lanier: Is that the motion as made?

Mr. Landoe: Yes.

Mr. Lanier: The motion is resisted.

Mr. Landoe: The plaintiff, in his complaint, has set forth certain substantive ultimate facts in the way of pleading which the defendant contends were not sustained by the burden of proof sufficient to establish a prima facie case. The plaintiff has the burden of establishing that the affections of the spouse were actually alienated from the plaintiff

by the wrongful acts or conduct of the defendant, which the plaintiff has alleged in his complaint. He has the burden of establishing that the defendant had knowledge of the marital relationship between the plaintiff and his former wife, which ultimate fact the plaintiff has alleged in his complaint. There is no testimony, either direct or by inference or otherwise, in the record at this time that the defendant had any knowledge up to the time referred to in plaintiff's complaint, and as outlined in the theory of the plaintiff's cause of action submitted preliminary to the trial of this case, which theory is, and which alleges, that the alienations, or the affections were completely alienated at Christmas of [199] 1947. There is no testimony in the record that the defendant had any knowledge that the plaintiff and his wife, Eunice, were married as of that time. That is an academic and fundamental requirement of proof as outlined in 42 C.J.S., page 333, and is supported by the decisions pertaining to the requirements and burden of proof in cases of this character. In addition to that, in the case of Pugsley vs. Smith, 194 Pacific, page 692, which is an Oregon case, but carries with it the general principles that apply to the procedure to be followed in the trial of this case, and that to my knowledge there are only about three cases in the State of Montana pertaining to alienation of affections, and we have to look to other jurisdictions to get a further determination of the principles involved, in which case the Court held, "Stated broadly, the rule is that the third person's conduct

must have been the intentional cause of the loss suffered by the injured spouse." There isn't any evidence in the record thus far that the defendant is guilty of any conduct or acts that in anywise, directly or indirectly, touched upon the marital relations between the plaintiff and his wife as of the time alleged in the complaint, namely, Christmas time, 1947. There is no evidence to show that the defendant, either intentionally or otherwise, did anything to interfere with the marital relations. There is no testimony here of him having enticed her, of him having induced her, of having persuaded her to [200] get a divorce. There is not a scintilla of evidence that the defendant did anything to persuade, influence, or entice the wife of the plaintiff, and for those reasons we take the position that the plaintiff has failed to introduce evidence sufficient to make out a *prima facie* [201] case.

* * *

Mr. Lanier: May it please the Court, since adjournment and during recess, we have decided on another move to make in this lawsuit, and for the time being, in lieu of the application to reopen for the plaintiff, we desire to move the Court for leave to amend the pleadings to conform to the proof, pursuant to Rule 15, Federal Civil Rules, subsections (b) and (c), in this particular: To substitute for paragraph 5 the following:

AMENDMENT TO COMPLAINT TO
CONFORM TO EVIDENCE

Plaintiff charges that while plaintiff was happily married and supporting his said wife, defendant, in November, 1947, met her at or near Bemidji, Minnesota, and began regularly keeping company with her; that in February, 1948, he ascertained that she was married; that from the time [214] of meeting the said wife of plaintiff in November, 1947, he alienated her affections, and in February or March, 1948, after learning of said marriage, he continued to keep company with her and proceeded to carnally know her with knowledge of the fact she was married; that in pursuance of her loss of affections aforesaid, plaintiff's wife obtained a divorce from the plaintiff, and married the defendant. Our motion is to submit this amendment in lieu of paragraph V of the complaint, pursuant to Rule 15 of the Federal Rules of Civil Procedure, which we submit controls in the matter of amendments. [215]

* * *

ORDER ALLOWING AMENDMENT

The Court: I'll grant the motion to amend. [222]

* * *

The Court: Yes, but assuming the truth of all of your evidence, the fact remains, doesn't it, that there has to be proof that the defendant was the aggressor, isn't that so?

Mr. Sutton: If the Court please, very shortly here is a summarization of Kansas, Indiana, Massa-

chusetts, Missouri, Nebraska and New York cases laying down the general rule relating to the conduct of strangers to the marriage. "The law looks with suspicion upon the conduct of strangers in blood in interfering in the relations of husband and wife. His motives, whether malevolent or improper, are always a material [224] consideration. If he by advice or enticement induces a wife to leave her husband, or takes her away, with or without her consent, and encourages her to remain away from him, or harbors and protects her while away from him, he does these things at his peril."

The Court: Yes, yes, I understand that. You are not on the point. The point is, was it his action. I am not talking about that. Of course, the stranger is considered by the law in a different light than, for example, the parent. The proof has to be much stronger in the case of parents, when you show a parent's interference, than when you show a stranger interferes. It doesn't have to be as strong, but you have to show it is the stranger who interferes.

Mr. Lanier: If the Court please, I recognize it is the duty, under all laws, under the laws, both state and federal, and under the laws of God Almighty Himself, is that the duty of one man to another is to keep his hands off another man's wife as long as she is another man's wife.

The Court: Yes, but you have got to show he laid his hands on her, don't you? You can't let it rest in the situation in which nobody knows whether it was the wife or the defendant who was the aggressor.

Mr. Sutton: Then, it is proper for the jury to find out.

The Court: If you had direct evidence on the one hand that it was the defendant, and on the other hand that it was the [225] wife, it would then be for the jury, sure.

Mr. Sutton: Here you have evidence or purported evidence, which to me is merely witch hunting by Mr. Landoe on cross-examination, where name after name is brought in on cross-examination, where he is trying to show there were many men, but there is not one whit of evidence that anyone of these men did as much as kiss her, or sleep with her, or have close contact with her, but here is the man who took her to St. Paul, that is the evidence.

The Court: No, it is not the evidence. Now, Mr. Sutton, I know what the evidence was. I sat here, too. It is not in evidence that the defendant took her to St. Paul.

Mr. Sutton: He admitted it, sir.

The Court: He did not. Let's get the record straight, and let's not quibble about things and don't try to mislead the Court in quoting the evidence. I don't appreciate that sort of argument. I am trying to decide a very important thing to your client and to the defendant, and to the Court, and there is no evidence in the case that the defendant took the plaintiff's wife to St. Paul.

Mr. Sutton: I apologize if I haven't stated it correctly.

The Court: He was at St. Paul and he went to the basketball game with her. That is the evidence.

Mr. Lanier: As I construe the law in the matter,

briefly [226] it is this: That the plaintiff does not have to prove, as I get it right in this book, the plaintiff need not show that the defendant's conduct was the sole cause of his wife's leaving him.

The Court: That is fine, that is all right, but you still have to show that it was a contributing cause, his act, what he did. There is no evidence at all that upon any of their meetings—and what they did at their meetings is not in evidence, except on one occasion where he said they were laying on the bed.

Mr. Sutton: Didn't he marry her?

Mr. Lanier: And that was in the morning around one or two o'clock when they laid on the bed.

The Court: There is no evidence as to who else was present, if anyone else was present. I mean the whole case is so weak that it just is one of those matters, because of the general weakness of the case, it makes it difficult, I confess it makes it difficult for the Court to rule specifically, because I am so embarrassed by the general weakness of the matter. What I want to find out is where you have proved the defendant was the aggressor, and I think that that is a necessary element, is it not?

Mr. Lanier: I never have got the idea from any decisions or anything I have ever read that that term "aggressor" comes into the case. [227]

The Court: Necessarily he has to be the enticer to alienate her affections. Surely a man is not responsible if he walks into a room, and the woman looks at him, and the woman seeing him says, "That man is for me."

Mr. Lanier: It is the business of the man, when he knows the woman is married, to keep his hands off.

The Court: Yes, it is his responsibility to keep his hands off another's man's wife, that is true, but you have to prove he laid his hands on her, that is the point.

Mr. Sutton: You don't have to prove adultery, do you, Judge?

The Court: No, no.

Mr. Lanier: I can't conceive any man would appreciate having his wife in bed with another man with nobody around.

The Court: We have to make the inference against you. You don't prove the circumstances that were there at all. He said they were laying on the bed. Why don't you go forward to show what the circumstances were?

Mr. Lanier: We had reasons for not doing that, if the Court please.

The Court: You don't want me to then take the big jump to the fact "Why, of course, they were in an act of sexual intercourse." If you had reasons for not showing what they were actually doing, it is to be inferred that they were not doing anything improper. It is the proper inference for the Court [228] and jury to draw, isn't that the law?

Mr. Lanier: I can't agree with the Court.

The Court: Don't you understand that to be the law, that when you have evidence available and don't produce it, that the inference is against you?

Mr. Lanier: All he saw they were on the bed.

Naturally, if he stopped and watched them, there wouldn't be anything else happen.

The Court: You didn't have him testify what the circumstances were. The circumstances are to be inferred against you. I can't infer that they were undressed, can I?

Mr. Lanier: The testimony is they had clothes on. I don't think (interrupted).

The Court: Maybe it is, but I don't think there is any testimony on that point.

Mr. Lanier: I don't think there is any testimony they weren't there.

The Court: I can't, because they were laying on the bed or the davenport, I can't infer they were engaged in an act of intercourse, because if they were, your witness would have so testified. I can't infer they were doing anything improper at that time or else your witness would have so testified. Is that not the situation? Isn't that the situation of the law?

Mr. Lanier: Where the Court and I disagree is on the situation there with regard to the way they were at that time [229] of night. My viewpoint is that there is only one inference to be drawn from that situation at that time of night, just one.

Mr. Sutton: I believe there is a presumption under Montana law that adultery was committed. Further, under the Montana law, on a motion such as Mr. Landoe made, the Court will under any possible legal means try to strain and bring the fact issue before the jury, and allow the case to be de-

cided on its merits rather than a technical motion such as this.

The Court: It is not technical. It is just the law if there are not sufficient facts, the Court has to assume the responsibility in these cases.

Mr. Landoe: Counsel doesn't meant to say there is a presumption that a man is guilty of an illegal act.

Mr. Sutton: I am speaking of laying on the bed with a woman. There is a Montana presumption.

Mr. Landoe: I have never heard of any such presumption.

Mr. Sutton: Read your presumption tables in the back of the Code.

The Court: There is no presumption that a man committed a crime.

Mr. Sutton: I am not speaking of adultery in a criminal sense, in a civil case. I do wish to state that we would like to ask opposing counsel just what test of a prima facie case he [230] would expect to have in this matter here, just how far do we have to go?

The Court: That is simple. You have cited the cases which set up the requirements or the elements of an alienation of affections case. There must be wrongful conduct of the defendant, and you must prove alienation of affections of the wife, and the casual relation between the two, and there has to be evidence establishing that in order to submit it to the jury, from which the jury can find that. That is what you have to prove, and that is what I am faced with here. Where is the evidence of the casual

relationship between any wrongful acts of the defendant and the loss of the affections of the wife? Your own proof is that the affections of the wife were lost at least by Christmas, 1947. That is your proof.

Mr. Lanier: Through influences of this defendant.

The Court: No, there is no direct proof of that at all. Your other proof is that the defendant saw her once, may have seen her once in November, after November 11th, at a time when he didn't even know who she was, and then possibly met her and was introduced to her late in November. There is no proof, as I recall it, that he ever saw her in the month of December.

Mr. Sutton: In cross-examination he admitted he had seen her at the Dutchess the first times.

Mr. Lanier: That brings me back to the question of the renewal of our application to reopen plaintiff's case for the [231] purpose of putting on further proof at this time. We make such application.

The Court: The application is denied. Counsel is only entitled to reopen his case where an injustice would be done by not permitting him to. Counsel himself has stated that he, upon his own deliberations, decided not to present the evidence he now seeks the Court to let him prove. We could possibly be here the next six months if you rested your case after every witness you put on and then said, "Give me another crack at it, if that isn't sufficient." Why, of course, the Court can't be put in that position if you decide upon one strategy, and

then seeing it is failing, ask the Court to give you another chance to try a different strategy. That is not fair. The application is denied. I am going to consider the matter for another few minutes. Court will stand in recess. Advise the jury to remain in attendance.

(Thirty-minute recess.)

The Court: Call the jury.

(Jury returns to courtroom.)

The Court: Ladies and gentlemen of the jury, at the close of the plaintiff's case, the defendant moved the Court to dismiss the action because sufficient facts had not been proved to submit the case to the jury. The Court has considered the problem completely and fully, I believe, and the Court decides that sufficient facts have not been proved to entitle the case [232] to go to the jury for consideration. The situation is simply this: That in order for the plaintiff to be entitled to submit the case to the jury, he must prove what is known as a *prima facie* case, and the Court in considering that must consider and accept as true for the purpose of making the decision that all those things which the plaintiff proved, or evidence which he submitted is accepted by the Court as true for the purpose of deciding this problem, but, then, after considering all of the things that have been attempted to be established here as being true, then the Court must look at it from the legal standpoint and find out whether, under all those circumstances, if a

jury would be warranted in finding a verdict against the defendant. As I say, I have considered that completely. In a case of this kind, there are three main elements that have to be proved. Those elements are that the plaintiff has to prove the defendant's wrongful conduct, then he has to prove the alienation of the affections of his wife, and then he has to prove that the defendant's wrongful conduct caused the alienation of affections. Well, the proof here just didn't entitle a jury to believe that. The proof of the plaintiff himself was that the wife's affections were at least alienated upon Christmas Eve, at least by that date, when she so announced to him they were alienated and she didn't love him any more and wanted a divorce. That was his proof. The proof with reference to the defendant up to that time is just [233] practically that he had met the wife at that point. The proof is further he didn't know who she was at that time. There is no evidence from which the jury would find even that he knew she was a married woman, and the acts of the defendant that were proved were nothing from which I believe the jury would be warranted in finding that his acts were wrongful. Apparently he met her at a bar where she frequented, where she lived with the owner of the bar and worked there at times, helped out, and the defendant on occasion went to the bar and saw her there, and on very few occasions, at least prior to the time when her affections were proved by the plaintiff to have been alienated. You couldn't find from those facts that the defendant's

acts alienated her affections. There is just a complete failure of proof, and in my opinion, I don't think the jury would be warranted in finding that there was such proof. The whole matter comes down to that general, simple proposition that the defendant's conduct was not such as to alienate her affections at that point. It must be established in any event that his conduct was wrong, that his intention was to alienate her affections from the plaintiff, that that was his purpose, that he enticed her away from the plaintiff. Now, from all the circumstances of the case, the jury just couldn't believe that. The whole marriage relationship, the whole course of the marriage and the actions of the plaintiff are such that the jury would just be acting, if they acted in [234] favor of the plaintiff, would be acting out of some generosity or some other matter other than pure facts of the case. As I say, you have to find not only that the plaintiff engaged, or that the defendant engaged in wrongful conduct, and not only find her affections were alienated, but you have to find that his conduct was the cause, or, at least, a contributing cause of the alienation of the affections, and it just isn't in the evidence. A case of this kind is very difficult to prove. There is just no doubt about that. You have to depend upon, primarily in most cases, circumstantial evidence. You never can get right into the heart and mind of people and find out what went on there, motivated them, what their intentions and purposes were, so, as I say, a case of this kind is very difficult of proof, and it depends

ordinarily upon circumstantial evidence. Of course, circumstantial evidence in a case is just as good as any other kind, but there are certain rules of law that govern every kind of case. For example, when you prove circumstances, under certain circumstances, the jury is entitled to draw inferences. Now, for example, as I say, you have to prove in this case that the defendant's conduct was wrongful. Well, an attempt is made to prove that by showing they were together. Well, by showing they were together doesn't prove that the defendant's conduct or his intent was wrongful. It doesn't prove that he was the enticer or encourager or aggressor in the [235] matter at all. You see two people together. One or the other may be the aggressor, and it is just as reasonable to believe that the girl in the case was the aggressor under the facts given as the defendant in the case, so you are not entitled, under those kind of facts, to draw the inference that he was the aggressor, because it is just as reasonable to draw the inference she was the aggressor. The facts just don't build up to a case, which, as I say, establishes a *prima facie* case and requires the defendant to go upon his proof and submit the case to the jury. Under all the facts and circumstances of the case, there has been a failure of proof, and so the case, you are discharged from further consideration of the case, and the case is dismissed upon the motion of the defendant. [236]

State of Montana,
County of Silver Bow—ss.

I, John J. Parker, certify that I am the official court reporter in the District Court of the United States for the District of Montana; that I reported the trial of the cause of Ray P. Koenig, plaintiff, vs. Donald Corcoran, being Cause No. 502 in the Helena Division of said Court, which was tried before the Honorable W. D. Murray, U. S. District Judge for the District of Montana, sitting with a jury at Helena, Montana, on June 14th and 15th, 1951, and that the foregoing is a full, true and correct transcript of all the proceedings had at the trial of said cause, with the exception of the voir dire examination of the jury.

Dated at Butte, Montana, this 24th day of July, 1951.

/s/ JOHN J. PARKER,
Official Court Reporter.

[Endorsed]: Filed August 22, 1951. [239]

CLERK'S CERTIFICATE TO
TRANSCRIPT OF RECORD

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable the United States Court of Appeals for the Ninth Circuit, that

the foregoing two volumes consisting of 240 pages, numbered consecutively from 1 to 240, inclusive, constitute a full, true and correct transcript of all portions of the record in Case No. 502, Ray P. Koenig vs. Donald Corcoran, required to be incorporated therein by designation of the appellant, as the record on appeal therein, as appears from the original records and files of said Court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Thirty-two and 80/100 Dollars (\$32.80) and have been paid by the appellant.

Witness my hand and the seal of said court at Helena, Montana, this August 27, 1951.

[Seal] /s/ H. H. WALKER,
Clerk, U. S. District Court,
District of Montana.

[Endorsed]: No. 13079. United States Court of Appeals for the Ninth Circuit. Ray P. Koenig, Appellant, vs. Donald Corcoran, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed August 30, 1951.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

Case No. 13079

RAY P. KOENIG,

Plaintiff,

vs.

DONALD CORCORAN,

Defendant.

POINTS RELIED UPON

To the Clerk of the United States Court of Appeals
for the Ninth Circuit:

Pursuant to Rule 19, we present the following as
points relied upon in this Appeal:

I.

Under the evidence the case presented was and
is one for submission to a jury.

II.

The Court erred in sustaining Defendant's Motion
for Dismissal and ordering dismissal of the action
pursuant to said Motion.

Dated this 22nd day of October, 1951.

LANIER & LANIER,

By /s/ P. W. LANIER, SR.,

By /s/ P. W. LANIER, JR.,

Attorneys for Plaintiff and
Appellant.

By /s/ ANDREW G. SUTTON,

Attorney for Plaintiff and
Appellant.

[Endorsed]: Filed Oct. 26, 1951.

